

No. 17-1087

IN THE SUPREME COURT OF THE UNITED STATES

FIRST RESORT, INC.,

Petitioner,

v.

DENNIS J. HERRERA, IN HIS OFFICIAL CAPACITY AS CITY
ATTORNEY OF THE CITY OF SAN FRANCISCO, ET AL.,

Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF AMICUS CURIAE OF
HEARTBEAT INTERNATIONAL, INC.
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS*¹

Heartbeat International, Inc. (Heartbeat) is the world's largest organization forming an affiliate network of individual pregnancy help centers. Heartbeat serves approximately 2,400 pro-life centers, maternity homes, and non-profit adoption agencies in over 50 countries, including approximately 71 pregnancy help centers in California and 177 in the states comprising the Ninth Circuit Court of Appeals.

Founded in 1971, Heartbeat is an interdenominational Christian non-profit organization whose mission is to “make abortion unwanted today and unthinkable for future generations” by providing an effective network of affiliated life-affirming pregnancy centers. Because of its mission, Heartbeat requires affiliated pregnancy centers to agree to its “Commitment of Care and Competence,” which includes, *inter alia*, commitments: (i) to provide “accurate information about pregnancy, fetal development, lifestyle issues, and related concerns;” (ii) to ensure that all “advertising and communication are truthful and honest and accurately describe the services [offered];” and (iii) not to “offer, recommend or refer for abortion or abortifacients.” Heartbeat is funded almost

¹ No party's counsel authored any part of this brief. No person other than *Amicus* and their counsel contributed any money intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) of the Rules of the Supreme Court, *Amicus* states that the parties to this case received timely notice of the filing of this brief and have consented to its filing. Letters stating their consent are on file with the Clerk.

entirely by private contributions; it receives no public funding.

San Francisco's Ordinance, if upheld, could substantially impact Heartbeat's affiliates because it could compel them to speak a message not only with which they profoundly disagree, but which directly contravenes their very reason for existence. At a minimum the Ordinance would chill their constitutionally protected speech in advertising their free pro-life pregnancy help services. Given its network of affiliated pregnancy centers, Heartbeat is uniquely well-positioned to provide information and argument to the Court regarding how the Ordinance is impermissible viewpoint discrimination against pregnancy centers under the First Amendment.

SUMMARY OF THE ARGUMENT

The petition should be granted because the Ninth Circuit's decision jeopardizes the expression of core First Amendment beliefs about politically charged subjects, abortion and contraception, and fails to apply well-established Supreme Court jurisprudence protecting strongly-held beliefs on such topics from state efforts to impose viewpoint-based mandates. The Court of Appeals' conclusion that these impositions on the speech of Petitioners – the same speech as that expressed every day by the staff of pregnancy centers affiliated with *Amicus* – are not “viewpoint-based” is clearly wrong. The Court should therefore grant review.

ARGUMENT

I. Pregnancy centers are characterized by their pro-life views in their history and operation.

Pregnancy centers are not-for-profit charitable institutions that exist to provide care and encouragement for expectant women who choose to carry their pregnancies to term. They are overwhelmingly faith-based and, in California, typically operate as public benefit corporations for a religious purpose pursuant to California’s Nonprofit Public Benefit Corporation Law, Cal. Corp. Code §§ 5110–6910. They compassionately seek to help those facing decisions that have profound consequences for life because of their pro-life views based on their religious beliefs, moral convictions, and personal life experiences.

A. Pregnancy centers were formed out of a commitment to pro-life views.

Pregnancy centers are the service arm of the pro-life movement. When laws banning abortion started to be overturned in the 1960s, pro-life activists responded by organizing “alternatives-to-abortion” services. See Heartbeat International, *A Generation Making a World of Difference*, at 3 (2016) (herein *World of Difference*).² In the wake of the Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973), pro-life individuals started to form a pregnancy help

² Available at <https://www.heartbeatinternational.org/pdf/HeartbeatHistoryBrochure.pdf>.

community to support women in the midst of unexpected or difficult pregnancies. This grassroots movement took off as pro-life individuals welcomed pregnant women into their own homes, started hotlines for women in urgent need, and organized local centers to respond to the needs of women in their own communities. See Margaret H. Hartshorn, *Foot Soldiers Armed With Love* 13, 19 (2014). The goal of the pregnancy help movement is to ensure that no woman ever feels forced to choose abortion because she lacks support or practical alternatives.

As pregnancy centers sprang up around the nation, they recognized a need for operational standards, training resources, networking, a directory of pregnancy help organizations, and a hotline to connect women with such organizations. In response, national organizations were formed, including *Amicus Heartbeat*—a federation of independently governed, locally funded community pregnancy centers, which includes maternity homes, pregnancy resource centers, pregnancy medical centers, and non-profit adoption agencies. See *World of Difference* at 11–12.

Today, there are some 2,750 pregnancy centers in the United States that collectively serve roughly 1.5 million clients per year. See Heartbeat International, *Life Trends Report*, at 2–3 (2018). Because pregnancy centers generally offer their services free of charge, they have limited funds and small paid staff, and rely heavily on volunteers looking for practical ways to live out their pro-life convictions. In 2017, some 81,360 women and men volunteered in centers around the

nation—contributing 6.5 million volunteer hours. See *id.* at 4.

In sum, for more than five decades, tens of thousands of volunteers, staff, professionals, and donors have come together as a caring and supportive pregnancy help community. They provide a safety net for women and men experiencing unexpected or challenging pregnancies, and help them make life-affirming choices. Their actions are motivated by deeply held pro-life convictions based on their faith, morals, and personal life experiences.

B. Pregnancy centers follow the Hippocratic Oath and comprehensive ethical guidelines consistent with their pro-life views.

Pregnancy centers are guided by a core set of ethical principles in their operations—from the content of their advertising, to the accuracy of the information they provide to clients, to the nature of the options they recommend.

Consistent with their pro-life views, national pregnancy center groups, including *Amicus*, follow the ethical guidelines as delineated in the Hippocratic Oath in their care of patients. The Hippocratic Oath is the basis of medical professional ethics. The Oath imparts to the physician the fiduciary responsibility to act at all times in the best interests of his or her patient, while simultaneously forbidding acts which are intrinsically harmful to patients, including elective abortion and euthanasia.

In addition to the Hippocratic Oath, pregnancy centers follow ethical guidelines and standards of care that show a profound respect for life and truthful, medically accurate information. These principles of medical ethics are embodied in nationally recognized standards of care for pregnancy centers. National pregnancy center organizations—to which most pregnancy centers belong—require compliance with comprehensive standards of care to maintain affiliation.

For example, *Amicus* Heartbeat requires its affiliates to agree with a written “Commitment of Care and Competence,”³ which includes commitments:

- To treat clients “with kindness, compassion, and in a caring manner”;
- To provide clients with “honest and open answers”;
- To provide “advertising and communication [which] are truthful and honest and accurately describe the services [offered]”;
- To provide “accurate information about pregnancy, fetal development, lifestyle issues, and related concerns”; and

³ Heartbeat International, et al., *Commitment of Care and Competence* (developed 1995, version date June 2009), <https://www.heartbeatinternational.org/about-us/commitment-of-care>.

- To offer “accurate information about abortion procedures and risks,” while refraining from “offer[ing], recommend[ing] or refer[ring] for abortion or abortifacients.”⁴

In addition, pregnancy centers are committed to transparency and quality service in their standards of care. For instance, national pregnancy center organizations maintain medical advisory boards. Affiliates are provided with conference and training opportunities, legal updates and manuals, policy and procedure manuals, medical service manuals, and other materials reviewed and approved by legal and medical professionals. All educational materials are to be reviewed for accuracy, professionalism, and suitability for patients and approved by medical professionals.

These commitments belie the criticisms leveled at pregnancy centers that they mislead women to prevent them from choosing abortion. Pregnancy centers (and certainly *Amicus* Heartbeat’s affiliates) invariably strive to provide accurate information about all options—while refraining from encouraging abortion—by educating, equipping, and empowering their clients to choose life.

⁴ *Id.*

C. Pregnancy centers provide free services, some of which are related to abortion, but do not perform or refer for abortion based on their pro-life views.

To fulfill their pro-life mission, pregnancy centers aim to support their clients emotionally and materially, offering a wide range of services. This holistic approach seeks to inform women of their options and the support available to them if they choose not to have an abortion. Pregnancy centers offer all or a vast majority of their services free of charge and are funded almost entirely by private donations from pro-life individuals who want to help provide practical alternatives to abortion.

Based on their pro-life views, pregnancy centers do not provide or refer for abortions or emergency contraception. Many of their services, however, are related to abortion and include:

- One-on-one, nonjudgmental peer counseling for women with unintended pregnancies and considering abortion;
- Accurate, medically documented information about prenatal development and the abortion procedure and its risks;
- Information about alternatives to abortion, including adoption, childcare, and child support;

- For those choosing not to have an abortion, childbirth and parenting classes; education and employment counseling; material assistance, including diapers and baby clothing; as well as referrals for medical services, for structural supports like housing and employment, and to adoption agencies and other support services; and
- Counseling for women and men seeking help after an abortion.

These services are offered in an environment of understanding, confidentiality, and compassion. Many of the peer counselors are women who have themselves had an unplanned pregnancy or an abortion.

In addition, some pregnancy centers offer certain limited medical services free of charge under the supervision of a licensed clinical medical director who serves without compensation. These centers generally provide three forms of medical services: pregnancy tests, limited ultrasounds, and sexually transmitted disease testing. Pregnancy centers inform prospective clients of the limited nature of the services they offer—which do not include abortion or abortion referrals—before agreeing to provide medical services, and in turn, the prospective clients acknowledge in writing the limited scope of services to be provided. All aspects of the pregnancy centers' services are centered around their pro-life views.

II. San Francisco’s Ordinance singles out and targets pregnancy centers with pro-life views because of these views.

As the Ninth Circuit recognized, San Francisco’s Ordinance applies only to pregnancy centers that do not directly provide or refer clients for abortion or emergency contraception. Pet. App. 26a-27a (citing S.F. Admin. Code, ch. 93 §§ 93.3(f), 93.4). The Ordinance prohibits “limited services pregnancy centers” from making or disseminating any statement about their pregnancy-related services that is “untrue or misleading, whether by statement or omission.” S.F. Admin. Code, ch. 93 § 93.4. A pregnancy center that has “limited services” is one that does not provide or refer for abortions or emergency contraception. Because the Ordinance does not prohibit false or misleading statements by *all* pregnancy centers or pregnancy centers that offer limited services in other regards—e.g., no adoption referrals, no material assistance to new mothers, etc.—it singles out pro-life pregnancy centers based on their views about abortion and emergency contraception.

The Ninth Circuit, however, concluded that “the Ordinance applies depending on the services offered, not the particular views espoused or held by a clinic.” Pet App. 26a. It further held that pregnancy centers “may choose not to offer abortions or abortion referrals for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons.” Pet. App. 26a-27a. But in reality, only pregnancy centers holding pro-life views will be unable to self-exempt from the Ordinance’s

requirements (by at least referring for abortion or emergency contraception).

Further, the Ordinance purposefully targets pro-life pregnancy centers because of their pro-life viewpoint. For instance, the Ordinance’s “Findings” state explicitly that it applies only to pregnancy centers that seek to counsel clients against abortion. Pet. App. 8a-9a. The Ordinance singled out pro-life pregnancy centers, targeting them *because* they counsel against abortion in accordance with their pro-life viewpoint.

III. San Francisco’s Ordinance is impermissible viewpoint discrimination and fails under strict scrutiny.

Viewpoint discrimination occurs when the government regulates speech based on “the specific ideology or the opinion or perspective of the speaker.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995)). It is a “‘more blatant’ and ‘egregious form of content discrimination.’” *Id.* (quoting *Rosenberger*, 515 U. S. at 829). As such, viewpoint-based regulations are subject to strict scrutiny. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 658 (1994).

In addition, this Court’s precedents have recognized that facially content-neutral laws are subject to strict scrutiny when the law cannot be “justified without reference to the content of the regulated speech,” or was adopted by the government “because of disagreement with the message [the

speech] conveys.” *Reed*, 135 S. Ct. at 2227 (citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)) (alteration in original); *see, e.g., United States v. Eichman*, 496 U. S. 310, 315 (1990) (the Court found that although a statute contained “no explicit content-based limitation on the scope of prohibited conduct” it was, nevertheless, still clear that “the Government’s asserted interest [was] related to the suppression of free expression”); *Ward*, 491 U. S. at 787, 791 (the Court looked to the governmental motive of a facially content-neutral ban, including whether the government had regulated speech “because of disagreement” with its message, and whether the regulation was “justified without reference to the content of the speech”).

Since, as explained above, San Francisco’s Ordinance is viewpoint discriminatory, it is subject to strict scrutiny. San Francisco has no compelling governmental interest in regulating Petitioner’s (or *Amicus* affiliates’) speech, and the Ordinance is not narrowly tailored. The Ordinance’s Findings and Respondents claim that pro-life pregnancy centers’ advertisements are false or misleading, but they have not provided one example of a false or misleading advertisement that confused a single woman, much less a woman who was actually “harmed” by a pregnancy center. Instead, their claims are based upon speculation and the desire to halt pro-life speech. In reality, this Ordinance is an effort to silence the pregnancy centers’ pro-life viewpoint. While Respondents can disagree with pregnancy centers’ pro-life speech, they cannot suppress their free speech by government fiat.

CONCLUSION

For the reasons set forth above, the petition should be granted, and the decision below reversed.

Respectfully submitted.

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